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25  
26 UNITED STATES DISTRICT COURT  
27 SOUTHERN DISTRICT OF CALIFORNIA  
28 SAN DIEGO DIVISION

TROLL BUSTERS LLC,

Plaintiff,

vs.

ROCHE DIAGNOSTICS GMBH, et al.,

Defendants.

Case No. 3:11-cv-56 IEG WVG

**DEFENDANT CLONTECH  
LABORATORIES, INC.'S RULE 5.1  
NOTICE OF CONSTITUTIONAL  
CHALLENGE**

Defendant Clontech Laboratories, Inc. ("Clontech") files this Notice regarding its constitutional challenge to 35 U.S.C. § 292 (the false marking statute), which is set forth in its

1 motion to dismiss the First Amended Complaint, filed on May 6, 2011 in the above-captioned  
2 matter.

3  
4 The question raised by Clontech's constitutional challenge is whether 35 U.S.C. § 292  
5 violates the Take Care Clause of Article II, § 3 of the United States Constitution by failing to include  
6 any of the procedural safeguards that have been held to preserve the constitutionality of other *qui*  
7 *tam* statutes like the False Claims Act, such as the right of the United States to be notified by the  
8 relator of a case before a defendant is served, the right to intervene, the right to seek dismissal or  
9 settlement of a false marking action over the objection of the relator, and the right to prevent  
10 dismissal of the action by the relator.

11 Dated: May 6, 2011

Respectfully submitted,

12  
13 PATTON BOGGS LLP

14 /s/ J. Thomas Gilbert

15 J. Thomas Gilbert

16 *Attorneys for Defendant*

17 *Clontech Laboratories, Inc.*  
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**PROOF OF SERVICE**

I, Rhonda L. Thomas, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 2000 McKinney Avenue, Suite 1700, Dallas, Texas 75201.

On May 6, 2011, I served the foregoing document described as:

**DEFENDANT CLONTECH LABORATORIES, INC.'S RULE 5.1 NOTICE OF  
CONSTITUTIONAL CHALLENGE**

to each of the addressees named hereafter as follows:

- ☒ BY CM/ECF TRANSMISSION. I am familiar with the United States District Court for the Southern District of California's practice for collecting and processing electronic filings. Upon the filing of a document with the Court, the CM/ECF system generates a Notice of Electronic Filing (NEF) that is delivered the assigned judge, and any registered users of the CM/ECF system that have appeared in the case. The NEF constitutes service of the document, and registration as a CM/ECF user constitutes consent to service by NEF.
- ☐ BY MAIL. I am readily familiar with this firm's practice of collection and processing of correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ BY FACSIMILE. I caused said document to be transmitted by facsimile transmission to the number indicated after the address(es) stated below.
- ☐ BY PERSONAL SERVICE. I caused said document to be hand delivered to the address(es) stated below.
- ☐ BY OVERNIGHT DELIVERY. I caused said document to be delivered to UPS/FEDERAL EXPRESS for overnight courier services to the address(es) stated below.
- ☐ BY EMAIL. The document stated herein was transmitted by email and the transmission was reported as complete and without error. A transmission report was properly issued indicating the date and time of receipt of the transmission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 6, 2011, at Dallas, Texas.

s/ Rhonda L. Thomas  
Rhonda L. Thomas

Service List

*Troll Busters®*, LLC v. *Roche Diagnostics GMBH*, et al.  
Case No. 11cv0056 IEG (WVG)

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